The Indiana Prosecutor

Published by the
Indiana Prosecuting Attorneys Council
August 2003

In this issue…

RECENT DECISIONS

INVESTIGATORY STOP NOT WARRANTED COURT SAYS

State v. Stickle
792 N.E.2d 51
(Ind. Ct. App. 7/22/03)

The Indiana State Police received an anonymous tip that on December 28, 2001, between 5:00 p.m. and 6:00 p.m. an illegal drug transaction would occur at the McDonalds' restaurant in Batesville. The state police were told that Jeremy Stickle and Rebecca Carter would be involved in that drug deal. The informant knew that Stickle and Carter would be driving either a maroon Ford Ranger or a copper-colored Jeep, and described Stickle as having short hair and a goatee. It was predicted that Stickle would be attired in bib overalls when he came to McDonalds on that December date.

Sure enough, at 5:00 p.m. on December 28, a maroon Ford Ranger circled the McDonalds' parking lot. The driver was a woman. A man with short hair and a goatee occupied the passenger's seat. After circling the restaurant, the Ranger drove out of the McDonalds' lot and into the Pamida discount store parking lot next door. The vehicle's two occupants, later identified as Stickle and Carter, went inside the Pamida store where they remained for about half-an-hour. At approximately 5:30 p.m. Stickle and Carter returned to McDonalds.

Stickle and Carter entered the restaurant and had placed their food order when they were approached by an ISP trooper. The trooper told the couple that they needed to come with him. Outside, two police cars had parked so as to block the couple's vehicle making it impossible for them to leave. When asked if he knew why the police were stopping him, Stickle admitted having stolen a cassette tape from the Pamida store just minutes earlier. During subsequent questioning, Stickle informed the troopers that he had a small amount of marijuana in his vehicle. In fact, troopers found marijuana both on Stickle's person and in his vehicle.

Prior to trial, Stickle moved to suppress the evidence found pursuant to the trooper's investigatory stop. The trial court granted the defendant's motion and the State appealed. Judge Maddingly-May (with Judge James Kirsch

concurring) sided with the trial judge. Maddingly-May concluded that a reasonable person in Stickle's position would not have believed that he was free to leave. He had, therefore, been "seized" the Court said. The two Court of Appeals judges further opined that the trooper-observed verification of the anonymous informant's prediction of Stickle's future activity did not provide the reasonable suspicion necessary to support an investigatory stop. The Court of Appeals, therefore, affirmed the trial court's suppression of the drugs found.

Judge Paul Mathias did not agree. In his dissent, Mathias concluded that the informant, by accurately predicting the time and place of Stickle's arrival, the vehicle in which he would arrive and providing an accurate physical description of Stickle, satisfied the requirements of the Fourth Amendment and the Indiana Constitution. An investigatory stop was warranted and the marijuana found should not have been suppressed, Judge Mathias concluded.

SUPREME COURT DENIES TRANSFER IN *STAMPER* CASE

Trash Pick-up Violated Constitutional Rights

At the IPAC Summer Conference in July, both Deputy Attorney General Gary Secrest and IPAC Assistant Director Becky McClure discussed the May 16, 2003, Court of Appeals opinion in the Larry Stamper case. At that time neither speaker knew whether or not the Supreme Court would grant transfer in the *Stamper* case. On August 14, the Indiana Supreme Court denied transfer.

This case dealt with the constitutionality of a "trash grab" by the Indiana State Police. A state police detective watched as Larry Stamper carried a garbage bag from his home and placed it at the bottom of a garbage pile some feet inside his property line near the end of his driveway. Approximately two hours later, the detective walked onto Stamper's property and retrieved the trash bag from the bottom of that pile. Inside the bag police found a burned hand-rolled marijuana cigarette and rolling paper. Using the items found in the bag, the state police secured a search warrant and searched Stamper's property. The police found a large quantity of marijuana and oxycontin on Stamper's property.

Stamper moved to suppress the evidence found. The trial court granted that motion. On appeal, the State argued that the trial court erred in granting Stamper's motion to suppress because Stamper had no expectation of privacy in a garbage bag left near the end of his driveway for collection. Stamper conceded that the search and seizure by officers in his case were permissible under the Fourth Amendment. Stamper's argument centered, however, on the constitutionality of the search under Article I §11 of the Indiana Constitution. The Court of Appeals concluded that the detective's actions (taking of garbage disposed of in an opaque bag which bag had been discarded on Stamper's property awaiting pick-up by his sister's fiancé) was a violation of Stamper's rights under the Indiana Constitution.

The Court of Appeals affirmed the trial court's order granting Stamper's motion to suppress.

GOVERNOR'S VETO OF NO EFFECT

D & M Healthcare et. al. v. O'Bannon et. al.
____N.E.2d _____
(Ind. Ct. App. 8/13/03)

Prosecutors - Take Note--
Effect of Pay Raise Unknown

Five nursing homes sought declaratory judgment that House Bill 1866 became law notwithstanding the governor's veto. 1866 limited the authority of the Indiana Family and Social Service Administration (FSSA) to reduce Medicaid reimbursement rates to nursing homes. At issue was whether the requirements of the Indiana Constitution that a vetoed bill be returned to the legislature on the first day of the next session is satisfied by return of the bill when the legislature is not in session. In this instance the bill was

returned six months before the first day of the next session.

The General Assembly passed HB 1866 on April 29, 2001. The bill specified that FSSA could not act without statutory authority to reduce Medicaid reimbursements to nursing homes. The General Assembly adjourned on April 29. On May 11, 2001, the governor vetoed HB 1866 and returned it to the House. The House was not in session on May 11. In fact, the next day that the House was in session was November 20 for "Organization Day". After Organization Day, the House was not scheduled to reconvene until January 7, 2002. On March 14, 2002, the House voted not to override the governor's veto.

The trial court determined that the governor's veto was effective and that HB 1866 had not become law. The Court of Appeals reversed the trial court. The Court of Appeals held that HB 1866 became law, notwithstanding the governor's veto, in that the vetoed bill was not returned as mandated by Article V of the Indiana Constitution. The language of that Article is clear and unambiguous, the Court of Appeals concluded. In the opinion of the Court of Appeals, the governor's failure to follow that clear and unambiguous constitutional language rendered the governor's veto without effect.

Another bill that passed both houses of the legislature in 2001 was the bill that would have raised the pay of judges and prosecutors from $90,000 to $99,000 per year. The governor vetoed that bill on May 11, 2001. It too was returned to the legislature when the legislature was not in session.

No one can predict the impact that the *D & M* case will have on the vetoed prosecutor pay raise. Will the governor seek transfer? Will the Supreme Court grant transfer or let the decision of the Court of Appeals stand? If transfer is granted, will the Supreme Court agree or disagree with the Court of Appeals interpretation of the requirements of Article V? At the current time there are many more questions than answers. A case worth watching.

FROM OTHER JURISDICTIONS

USE OF POWERPOINT IN OPENING STATEMENT APPROVED

State of Arizona v. Sucharew
66 P. 3d 59
(Ariz. Ct. App. 2003)

When the prosecutor preparing to try Scott Sucharew in the Superior Court in Maricopa County, Arizona, advised the court and defense that he intended to utilize PowerPoint in his opening statement, Sucharew objected. The prosecutor's presentation consisted of thirty slides including: 1) a title page; 2) photographs of an accident scene and vehicles with superimposed descriptions and headings; 3) a map; 4) a listing of the defendant's blood alcohol content and physical symptoms; and 5) a list of the elements of the two charged offenses. The defendant objected on three grounds. First, Sucharew objected on the ground that he had not received advance notice of the presentation. Secondly, he argued that the Arizona Rules of Criminal Procedure were silent on the use of such material. And, finally, Sucharew argued that the presentation referenced materials that might not be introduced at trial. After reviewing the proposed presentation, the trial court overruled the defendant's objection and the PowerPoint presentation was given.

In addition to the objections voiced to the trial court, on appeal the defendant argued that the trial court had abused its discretion in permitting the use of the PowerPoint presentation in his opening statement because the presentation involved a "computer generated exhibit." The Court of Appeals found that although a computer was used in the presentation, the actual presentation did not include any computer simulation. Essentially, the presentation was a slide show of photographic exhibits. The photos included were the same ones disclosed to the defense during pre-trial discovery and later admitted into evidence at trial. The superimposed descriptive words and labels were no more than labels tracking the subject matter of the prosecutor's opening statement and the defendant made no objection to the substance of the actual opening statement. The Court of Appeals

concluded that the trial court had not abused its discretion in permitting the State to use a PowerPoint presentation during its opening statement.

ED NOTE: IPAC has on file a copy of the brief prepared by the prosecutor in the *Sucharew* case. This brief discusses the propriety of using PowerPoint not only in opening, but also in closing argument and in direct examination of expert witnesses. A copy of this brief can be obtained by contacting the IPAC Office at 317-232-1836.

COLORADO COURT OF APPEALS APPROVES FAKE DRUG CHECKPOINT

Police officers in Colorado, with intent to interdict persons transporting drugs to a local music festival, set up large road-side signs which read, "Narcotics Checkpoint Ahead" and "Narcotics Canine Ahead." In reality, there was neither a checkpoint nor a drug dog. The purpose of the signs was to allow police officers hiding on a nearby hillside to observe the reactions of people after they read the road signs. As they watched, one of the officers on the hill observed a passenger in Stephen Roth's car toss a small item out of the window onto the side of the road. The officer radioed a fellow-officer further down the road and described the littering violation observed. The first officer also provided a description of Roth's car.

Defendant Roth was flagged down by the second officer. Roth was advised that he was being stopped because his passenger had been seen throwing something out of the car. Approximately one minute into the stop, officer number one again radioed the second officer. This time the officer on the hill advised that the item tossed had been recovered and that it was a pipe containing residue suspected to be marijuana. The defendant's car was searched and another marijuana pipe and some psilocybin mushrooms were found therein.

In 2000, the United States Supreme Court held, in *Indianapolis v. Edmond*, that a drug checkpoint in which vehicles are stopped without reasonable suspicion that the occupants have engaged in criminal activity constitutes illegal police conduct in violation of the Fourth Amendment. The situation presented in the *Roth* case, however, presented a slightly different issue. The Colorado Court of Appeals held that the use by the police of a fictitious drug check point did not violate Roth's rights under the Fourth Amendment because the stop of his car by the police was based upon an individualized suspicion of unlawful activity. The Court of Appeals also rejected the defendant's contention that his rights guaranteed by the Colorado Constitution had been violated.

The Marion County Sheriff's Department earlier this month set up fake drug checkpoints in the Indianapolis area much like those described in *Roth*. The practice was discontinued just days after its inception to permit the Sheriff's Department to "take a closer look" at the practice.